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Supreme Court, U.S.
FILED
[illegible] 31 2001
OFFICE OF THE CLERK

No. 00-1464

In The

Supreme Court of the United States

PHELPS DODGE CORPORATION and
ARIZONA PUBLIC SERVICE COMPANY,

Petitioners,

v.

THE UNITED STATES, et al.,

Respondents.

**On Petition For Writ Of Certiorari
To The Supreme Court
Of The State Of Arizona**

PETITIONERS' REPLY MEMORANDUM

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15 pp

CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement required by Rule 29.6, Rules of the Supreme Court of the United States, is included in Petition No. 00-1464 at page vi. The information in that statement remains accurate.

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Petitioners Phelps Dodge Corporation and Arizona Public Service Company respectfully submit this Reply Memorandum in support of their Petition for Writ of Certiorari in Case No. 00-1464. Four briefs in opposition to the Petition were filed with this Court. The Respondents in Opposition are the United States; the Gila River Indian Community ("GRIC"); the San Carlos Apache Tribe, Tonto Apache Tribe and Yavapai-Apache Nation ("the Apache Respondents"); and the Salt River Valley Water Users' Association and Salt River Project Agricultural Improvement and Power District ("SRP").

The Briefs in Opposition raise several issues not previously addressed by Petitioners. Accordingly, pursuant to Rule 15.6, Rules of the Supreme Court of the United States, Petitioners submit this Reply to address those issues. Respondents' arguments in opposition to the Petition fall into three main categories. First, several Respondents argue that Petitioners, and other similarly situated groundwater users, do not "own" groundwater underlying their land. Second, two Respondents argue that the Opinion Below is not a final judgment under 28 U.S.C. § 1257(a). Finally, two Respondents argue that Petitioners' takings claim is not ripe for adjudication.

I. PETITIONERS ASSERT A RIGHT TO *USE* GROUNDWATER, NOT A RIGHT TO OWN GROUNDWATER.

Each of the Respondents argues that Petitioners do not "own" groundwater under Arizona law. Respondents rely in large part on *Town of Chino Valley v. City of Prescott*, 638 P.2d 1324 (Ariz. 1981) ("*Chino Valley II*") for this proposition. Petitioners do not, however, argue that they "own" groundwater. Rather, Petitioners have well-defined property interests in the *use* of groundwater. This is precisely the same interest (*i.e.*, a right to use, rather than outright ownership of water) enjoyed by surface water appropriators. *See* Ariz. Rev. Stat. § 45-141.A. ("The

waters of all sources . . . belong to the public . . . "). The Gila River Indian Community's Response concedes as much. *See* GRIC Resp. at 24-25 ("Under Arizona law, no party owns water, surface or underground.").

Just as surface water appropriators do not enjoy a right of ownership in the water itself, but rather a right to make beneficial use of that water, so too do landowners enjoy a right to reasonably use percolating groundwater. This point is stated explicitly in *Chino Valley II*, where the Arizona Supreme Court held that a landowner's interest in percolating groundwater is a right "to the usufruct of the water." 638 P.2d at 1328. Moreover, as the United States Court of Federal Claims has recently recognized, such "usufructuary" rights are property interests entitled to protection under the Fifth Amendment. *See Tulare Lake Basin Water Storage Dist. v. United States*, No. 98-101 L, 2001 U.S. Claims LEXIS 72, at *20 (Fed. Cl. Apr. 30, 2001) (quoting *International Paper Co. v. United States*, 282 U.S. 399, 407 (1931) ("The petitioner's right was to the use of the water; and when all the water that it used was withdrawn from the petitioner's mill and turned elsewhere by government requisition for the production of power it is hard to see what more the Government could do to take the use.").

Although the usufructuary right to make reasonable use of percolating groundwater is subject to *prospective* regulation under a state's police power, *see Chino Valley II*, 638 P.2d at 1327, it is *not* subject to retroactive revocation by a court that has uniformly recognized the right in all prior cases. As this Court recently stated, "a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law." *Phillips v. Washington Legal Found.*, 524 U.S. 156, 167 (1998).[1]

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[1] The United States suggests that this Court should not review the Opinion Below because the Arizona Supreme Court "did not disavow any of its prior holdings." U.S. Resp. at 13. However, merely because the court asserted that the Opinion

Because the Arizona Supreme Court has effectively vitiated the right to make reasonable use of groundwater, the Opinion Below constitutes a taking of the usufructuary rights of Petitioners and millions of other Arizona citizens.

II. THE ARIZONA SUPREME COURT'S DISPOSITION OF THE TAKINGS ISSUE IN THE OPINION BELOW CONSTITUTES A FINAL JUDGMENT.

The United States and SRP each argue that the question presented by Petitioners does not constitute a final judgment under 28 U.S.C. § 1257(a). *See*, U.S. Resp. at 8-11; SRP Resp. at 5-13.[2] GRIC does not address this

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Below is consistent with its prior precedents does not make it so. This Court has, in appropriate circumstances, shown a willingness to review state supreme court decisions that break with established precedent, particularly where important federal constitutional rights are at stake. *See, e.g., Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) ("an unforeseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this Court's review of a federal question"); *Wright v. Georgia*, 373 U.S. 284, 291 (1963); *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 456-58 (1958).

[2] SRP's facile argument on this issue is unpersuasive. SRP asserts that last term when it pursued a petition for certiorari (No. 99-1389) arising out of these very same proceedings, that decision was final. Now, when it opposes the pending Petition, it asserts that the question presented by Petitioners is not final, stating that the "facts and policies applicable to a consideration of the finality issue . . . are substantially different." SRP Resp. at 11, n.14. SRP does not, however, identify any differences. SRP then asserts that some future cases arising out of the Arizona Supreme Court's interlocutory review of specific questions in the adjudications "may qualify for immediate review." SRP Resp. at 13, n.15. SRP's position on finality is internally inconsistent and self-serving. More persuasive was SRP's argument in support of its Petition No. 99-1389, where it stated

issue. The Apache Respondents affirmatively state that "the method of determining subflow is a final judgment of the Arizona Supreme Court. . . . " Apache Resp. at 14.

As the Apache Respondents appear to concede, the question presented by the Petitioners is, under the relevant precedents of this Court, final for purposes of Section 1257(a). The seminal case discussing finality is *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). *Cox* reviewed the Court's finality jurisprudence and noted that "[t]here are now *at least* four categories of such cases in which the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." *Id.* at 477 (emphasis added).

Cox did not purport to require that each federal question fit definitively within one of the four described categories. Rather, the Court stated that it long had "held that the requirement of finality is to be given a practical rather than a technical construction." *Id.* at 478, n.7 (quoting *Gillespie v. United States Steel*, 379 U.S. 148, 152 (1964) and *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)) (internal quotation marks omitted). *Cox* also noted that "the Court had not understood the final-judgment rule 'in this strict and technical sense, but has given [it] a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the legislature.' " *Id.* at 480-81 (quoting *Forgay v. Conrad*, 47 U.S. (6 How.) 201 (1848)) (alteration in original).

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that "[d]eferring review by this Court of federal issues involved in the pending Arizona adjudications until all state court proceedings on such issues have been concluded would leave the parties in limbo for decades." SRP Reply to Briefs in Opposition, No. 99-1389, at 7.

A. The Issues Raised by Petitioners Fall Within the Second *Cox* Category of Final Judgments.

The question presented by Petitioners in this case falls squarely within the second category discussed in *Cox*. That category was described in *Cox* as including cases "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Cox*, 420 U.S. at 480.

In the case now before this Court, the federal issue (whether a taking has occurred), has undeniably been finally decided by the Arizona Supreme Court. That question undoubtedly will survive and require decision regardless of subsequent litigation in the Gila River General Stream Adjudication. However, given the nature of the Adjudication, it may be many years before Petitioners or other similarly situated groundwater users would be able to again present the takings issue to this Court. It is precisely for this reason that the Arizona Supreme Court's decision on the takings issue should be considered a final judgment under Section 1257(a) and be reviewed by the Court at this time.

The Arizona Supreme Court left no doubt as to its views on the takings issue. In a single paragraph of a lengthy opinion, the court simply stated that it was "reject[ing]" Petitioners' takings argument. Opinion Below, ¶ 47, App. A33. The court offered no basis for this rejection other than its statement that "landowners have 'no legally recognized property right in potential, future groundwater use. . . . ' " *Id.* (quoting *Chino Valley II*, 638 P.2d at 1328). This statement, of course, is the basis for one of Petitioners' takings arguments. Both the Petitioners and Respondent ASARCO filed motions for reconsideration on the takings issue. The motions were rejected by the court without explanation.

From this summary disposition, it is clear that the Arizona Supreme Court will not again revisit the takings

issue. Unless this Court reverses the Opinion Below, it will provide the rules for all further proceedings in the Gila River Adjudication[3] concerning water pumped from wells pursuant to state law. The lower courts conducting the adjudications are not at liberty to deviate from the supreme court's determinations regarding the over-broad subflow zone, its cones of depression analysis, or its conclusion that landowners have no legally recognized property right in groundwater.

Those determinations inevitably will lead to injunctions against wells either located in, or with cones of depression extending into, the supreme court's new subflow zone.[4] In the context of these adjudications, which have already been under way for more than 20 years, Petitioners and other groundwater users should not be put at risk of such injunctions and be forced to renew their takings claims in a state court system that already has clearly rejected those claims. The extended delay inherent in such a process may well lead to the financial ruin of any party so enjoined, because without water, it is impossible to make any economically viable use of one's land in an arid state like Arizona.

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[3] The Opinion Below also may apply in the general stream adjudication pending in Arizona's Little Colorado River Basin. *See* Petition at 5, n.1. *See also* SRP Resp. at 2.

[4] SRP's suggestion that the lower courts may "excuse noncompliance with statutory requirements" by "assign[ing] a priority date based upon when the well was drilled" (SRP Resp. at 9, n.13) provides no comfort to Petitioners and other groundwater users. There is no statutory basis for assigning priority dates to wells, and even if SRP would accede to such a result, there is no guarantee (or any likelihood) that all other surface water appropriators in the State of Arizona would do so.

B. Because Arizona's General Stream Adjudications May Continue Indefinitely, Petitioners Would Be Denied Effective Relief if Forced to Await Completion of the Proceedings.

For similar reasons, SRP's suggestion that this Court defer "any review of *Gila River IV* until the end of the adjudication" (SRP Resp. at 9) would provide no meaningful remedy for Petitioners. In fact, there may never be an "end of the adjudication." Even after determination of all 77,000 water rights claims asserted in the two adjudications (a process that has not yet progressed to the point where a single water right has been adjudicated), the courts will be faced with the potentially perpetual task of enforcing those rights among users with conflicting claims to the same water supply. Thus, the adjudication courts can be expected to retain jurisdiction indefinitely and to actively adjudicate conflicts far into the future.[5]

By comparison, a water rights adjudication of limited scope has been pending in the United States District Court for the District of Arizona since 1925. That action, commonly referred to as *Globe Equity No. 59*, addresses the claims of several thousand parties who use water from the mainstem of the Gila River. As such, it involves only a subset of the more than 24,000 claimants involved in the Gila River Adjudication (which includes not only the mainstem of the Gila River, but also several important tributary streams such as the Salt and Verde Rivers). Nevertheless, *Globe Equity No. 59* has endured for more than

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[5] For this reason, *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997), is inapplicable to the present case. There, in the context of a "typical" tort suit involving a limited number of parties, the Court noted that "[i]f the federal question does not become moot, petitioners will be free to seek our review when the state-court proceedings reach an end." *Id.* at 77-78. Because the adjudications may never end, the same cannot be said for the issues currently before the Court.

sixty-five years. Active litigation between the parties continues to this day. At least eight reported decisions have been issued by either the District Court or the Ninth Circuit during that time. If *Globe Equity No. 59* can continue for sixty-five years without any "end" in sight, there is no credible possibility that either Adjudication will end in a time or manner that would provide Petitioners with a meaningful opportunity to have their takings arguments heard at the conclusion of the proceedings.

For all of these reasons, the Arizona Supreme Court's rejection of Petitioners' takings claims should be considered a final judgment. This Court has on two prior occasions granted certiorari to address important federal issues arising at interlocutory stages of pending water rights adjudications. *See Wyoming v. United States*, 488 U.S. 1040 (1989), *aff'd without opinion*, 492 U.S. 406 (1989); *United States v. New Mexico*, 438 U.S. 696 (1978). The Court did so in spite of the fact that both adjudications were ongoing and that not all federal issues had been resolved at the time of review. Presumably, the Court in those instances recognized that the "danger of denying justice by delay[ing]" review outweighed any argument that the issues at stake were not final. *Cox*, 420 U.S. at 478, n.7 (internal quotation marks omitted). Because rejection of this Petition also would "deny justice by delay," the Court should treat the Opinion Below as a final judgment pursuant to Section 1257(a).

III. THE TAKINGS ISSUE IS RIPE FOR REVIEW BY THIS COURT.

SRP also asserts that the question presented by Petitioners is not ripe for review at this time. The Apache Respondents make a similar argument. In support of this argument, SRP cites *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), and a number of earlier cases addressing ripeness in the context of a Fifth Amendment takings claim. However, SRP fails to

explain, or even acknowledge, this Court's most recent decision on this subject, *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997). *Suitum* carefully reviewed each of the earlier cases cited by SRP and concluded that the takings claim at issue was ripe for review. For the reasons articulated in *Suitum*, the question presented by Petitioners in this case is also ripe for review.

Specifically, *Suitum* explained that *Williamson County* requires a " 'final, definitive position' " of the state agency in question before a takings claim will be considered ripe for review. *Suitum*, 520 U.S. at 737 (quoting *Williamson County*, 473 U.S. at 191). The Court also noted *Williamson County's* requirement that the party asserting a takings claim "must at least 'resort to the procedure for obtaining variances . . . [and obtain] a conclusive determination. . . . ' " *Id.* (quoting *Williamson County*, 473 U.S. at 193) (alterations in original). Similarly, *Suitum* noted that *MacDonald* "reaffirmed *Williamson County's* requirement of a final agency position." *Id.*

In the case now before this Court, the Arizona Supreme Court is the relevant state "agency." That court has rendered a final decision leaving no doubt that it has rejected Petitioners' takings claims. Although the lower courts of Arizona will apply the decision, only the Arizona Supreme Court has the power to modify it. The decision itself clearly constitutes the "final, definitive agency position" required by *Suitum*, *MacDonald* and *Williamson County*. Furthermore, though not a mandatory procedural step, the motion for reconsideration filed by Petitioners and subsequently denied by the court, satisfies any requirement that Petitioners "resort to the procedure for obtaining variances." The only such procedure available to parties aggrieved by a decision of the supreme court is a motion for reconsideration. *See* Ariz. R. Civ. App. P. 22.

Moreover, it is not clear that the cases cited by SRP apply to the takings claim asserted by Petitioners. Each of those cases analyzed ripeness in the context of "regulatory takings" where the " 'local agencies charged with administering regulations governing property development are singularly flexible institutions . . . . ' " *Suitum*, 520 U.S. at 738

(quoting *MacDonald*, 477 U.S. at 350). In this case, the lower courts must take their direction from the Opinion Below. They have no discretion to deviate from its conclusions. Those courts will be singularly *inflexible* institutions when applying the new subflow zone, the cones of depression analysis, and the Arizona Supreme Court's statement regarding property rights in groundwater.

Because nothing the lower courts may do in the future can alter these fundamental aspects of the Opinion Below, the decision of the Arizona Supreme Court is ripe for review at this time. *See Suitum*, 520 U.S. at 739 ("Because the agency has no discretion to exercise over Suitum's right to use her land, no occasion exists for applying *Williamson County's* requirement that a landowner take steps to obtain a final decision about the use that will be permitted on a particular parcel."). In *Suitum*, the Court noted that an agency should not be allowed to argue that a "takings claim could be kept at bay from year to year" because "such a rule would allow any local authority to stultify the Fifth Amendment's guarantee." *Id.* at 741. For the very same reason, this Court should conclude that ripeness is not an impediment to timely, effective review of the takings issues raised in the Petition.

IV. CONCLUSION.

For the reasons articulated in Petition No. 00-1464, and the additional reasons set forth in this Reply, Petitioners respectfully request that this Court issue a writ of certiorari to review and reverse the Opinion Below.

Respectfully submitted,

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